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UNITED STATES SENATOR • TEXAS

WHO WILL DEFINE MARRIAGE, THE PEOPLE OR THE COURTS?

By U.S. Sen. John Cornyn

An on-going national conversation about the importance of marriage intensified recently when four Massachusetts judges declared traditional marriage a "stain" on our laws that must be "eradicated." Since then, Americans have witnessed startling and lawless developments nationwide – from Boston to San Francisco, and numerous points between.

The debate over marriage was sparked last June when the U.S. Supreme Court issued its controversial ruling in Lawrence v. Texas. In the hands of activist judges, the Lawrence decision presents a serious threat to traditional marriage laws across the nation, as well as to democracy. That's not just my conclusion – it's the conclusion of legal experts, constitutional scholars, and Supreme Court observers across the political spectrum.

The Senate joined this national conversation through a hearing I convened recently to answer the question: "What are the national implications of the Massachusetts Goodridge decision and the judicial invalidation of traditional marriage laws?"

It's important to note at the outset: The American people didn't initiate this discussion, nor did members of Congress of either party. Let's be clear and honest about this. The only reason we are discussing this issue today is the work of aggressive lawyers and a handful of activist judges.

Across diverse civilizations, religions and cultures, mankind has consistently recognized the institution of marriage as society's bedrock institution. After all, as a matter of biology, only the union of a man and a woman can reproduce children. And as a matter of common sense and countless studies by social scientists, the union of mother and father is the strongest foundation for the family and for raising children.

Unsurprisingly, then, traditional marriage has always been the law in all 50 states. At the national level, overwhelming congressional majorities – representing over three-fourths of each chamber – joined President Clinton in codifying a federal definition of marriage by enacting the bipartisan Defense of Marriage Act of 1996.

In light of this extraordinary consensus, it is offensive for anyone to charge supporters of traditional marriage with bigotry. Yet that is exactly what activist judges are doing today: accusing ordinary Americans of intolerance, while abolishing American traditions by judicial fiat.

Renegade judges (and some local officials) are attempting to dismantle traditional marriage. Marriage laws have already been flouted in Massachusetts, California, New Mexico, and New York. Lawsuits seeking the same result have also been filed in Nebraska, Florida, Indiana, Iowa, Georgia, Arizona, Alaska, Hawaii, New Jersey, Connecticut, and Vermont, as well as my home state of Texas.

These activist judges have not even bothered to disguise their hostility to traditional marriage.

Disregarding the democratic process, four judges in Massachusetts concluded that the "deep-seated religious, moral, and ethical convictions" underlying traditional marriage are "no rational reason" for the institution's continued existence. They contended that traditional marriage is "rooted in persistent prejudices" and "invidious discrimination," and not the best interest of children. They even suggested abolishing marriage outright, stating that "if the Legislature were to jettison the term 'marriage' altogether, it might well be rational and permissible."

Apologists for the Massachusetts court lamely state that democracy and marriage can be restored in that state. But not until 2006 – and only through a process citizens shouldn't have to endure just to preserve current law. Moreover, the problem is not limited to Massachusetts. In California, courts have refused to enforce that state's family code against a lawless mayor. New Mexico, New York, and Illinois officials have followed.

Defenders of marriage and democracy alike recognize that this is a serious problem – and indeed a national problem, requiring a national solution.

Congress recognized the national importance of marriage in 1996 by codifying a federal definition of marriage. And most officials continue to express their support for traditional marriage. Words are not enough to combat judicial defiance, however. If elected representatives are to retain their relevance in a democracy, words must be joined by action.

True, the Constitution should not be amended casually. But serious people have reluctantly recognized that an amendment may be the only way to ensure survival of traditional marriage in America.

Why is an amendment necessary? Two words: activist judges.

Legal experts across the political spectrum agree the Lawrence decision presents a federal judicial threat to marriage. Harvard Law Professor Laurence Tribe has said, "you'd have to be tone deaf not to get the message" that Lawrence renders traditional marriage "constitutionally suspect." According to Tribe, the defense of marriage is now a "federal constitutional issue," and he predicts the U.S. Supreme Court will eventually reach the same conclusion as the Massachusetts court.

Tribe's predictions are confirmed, of course, by the Massachusetts ruling, which not only invalidated that state's marriage law, but also suggested that Lawrence might be used to threaten laws across the country – including the federal Defense of Marriage Act. Tribe is also joined by members of Congress who argue that federal law is "unconstitutional."

Moreover, constitutional scholars predict that Nebraska – which has approved a state constitutional amendment defending marriage – may soon see that amendment invalidated on federal constitutional grounds in a pending federal lawsuit.

The only way to save laws deemed "unconstitutional" by activist judges is a constitutional amendment. Indeed, we have ratified numerous amendments as a democratic response to judicial decisions before – including the Eleventh, Fourteenth, Sixteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments.

This discussion should be bipartisan and respectful. Two months before the Massachusetts ruling, my subcommittee examined the potential Lawrence threat to the Defense of Marriage Act. Some scoffed that it was not a serious legal issue. Given recent events, those observers should scoff no more.

Sen. Cornyn is chairman of the U.S. Senate subcommittee on the Constitution, Civil Rights and Property Rights. He served previously as Texas Attorney General, Texas Supreme Court Justice, and Bexar County District Judge. Cornyn chaired a hearing of the Constitution subcommittee on Wednesday, March 3 to examine the national implications of judicial activism on traditional marriage laws.